20252

SHEA & GARDNER

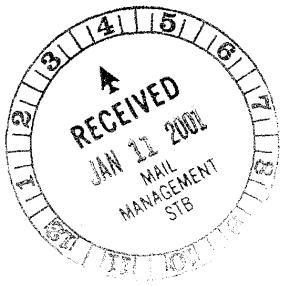
1800 MASSACHUSETTS AVENUE, N. W.

WASHINGTON, D. C. 20036-1872

(202) 828-2000
FAX: (202) 828-2195

RALPH J. MOORE, JR.

DIRECT LINE: (202) 828-2070
E-MAIL: RMOORE@SHEAGARDNER.COM



January 11, 2001

By Hand Delivery

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

Re: Major Rail Consolidation Procedures
STB Ex Parte No. 582 (Sub-No.1)

Dear Mr. Williams:

Enclosed for filing in the above-referenced docket are the original and 25 hard copies of the Rebuttal Comments of the National Railway Labor Conference, as well as a copy on a 3.5 inch IBM-compatible floppy diskette in WordPerfect 7/8/9 format.

Very truly yours,

Ralph J. Moore, Jr.

RJM/daw
enclosures
cc: all parties of record

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

REBUTTAL COMMENTS OF THE NATIONAL RAILWAY LABOR CONFERENCE

David P. Lee, Vice Chairman & General Counsel
Joanna L. Moorhead, Labor Counsel
National Railway Labor Conference
1901 L Street, N.W.
Washington, D.C. 20036

Ralph J. Moore, Jr.
Eugenia Langan
Donald J. Munro
Shea & Gardner
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Attorneys for the National Railway Labor Conference

January 11, 2001

TABLE OF CONTENTS

REBUTTAL COMMENTS OF THE NATIONAL RAILWAY LABOR CONFERENCE

In these rebuttal comments, the National Railway Labor Conference ("NRLC") responds principally to the Reply Comments of the Rail Labor Division, Transportation Trades Department, AFL-CIO ("RLD"), the Department of Transportation ("DOT"), and the Brotherhood of Railroad Signalmen ("BRS") on the Notice of Proposed Rulemaking in this docket.[1/]

I. The Statute as Construed in *Dispatchers* Precludes the Proposal To End Modification of Collective Bargaining Agreements

From the outset of the proceedings in this docket, commencing with the hearing in March through the opening comments on the NPR, RLD has asked the Board to "end" what the unions and DOT call "cramdown" – the modification of collective bargaining agreements ("CBAs") under 49 U.S.C. §§ 11321(a) and 11326(a) when necessary to allow implementation of mergers. As RLD put it succinctly, it has asked the Board to "adopt a clear policy -- that policy must be that cramdown is dead." RLD Comments on NPR at 11.[2/]

We have pointed out that elimination of the power to modify CBAs would contravene § 11321(a) as construed by the Supreme Court in *Norfolk & W. R. Co.* v. *Train Dispatchers*, 499 U.S. 117 (1991) ("*Dispatchers*"). NRLC Comments at 2-3.

1/ These comments, like the NRLC's prior comments in this docket, are filed on behalf of the National Carriers' Conference Committee ("NCCC") and all of the NRLC's member railroads except Canadian National affiliates.

2/ The term "cramdown" is rhetorical, not descriptive. It suggests a power to tear up and abrogate the unions' existing CBAs and substitute new rules by administrative fiat. As we have shown, that does not happen under the current statutory regime. What happens is that one set of pre-existing arrangements rather than another (generally in CBAs with the very same union) is chosen by an arbitrator to apply in situations where application of both sets of arrangements would preclude integration of operations and personnel, thus frustrating implementation of an approved merger.

Dispatchers held that the provision now found in § 11321(a), relieving carriers of "all other law" as necessary to implement mergers, applies to CBAs, because otherwise carriers would have to seek necessary modifications through the "almost interminable" RLA procedures, which would "so delay" implementation of merger-related transactions that the "efficiencies the carriers sought would be defeated." 499 U.S. at 133 (citations omitted).

RLD now concedes that the NRLC's characterization of *Dispatchers* is "true." RLD Reply Comments on NPR 6. It claims, however, that the real question is not whether modification of CBAs is allowed by law (that is settled). Rather RLD now contends that "the entire dispute here hinges on the meaning of the term 'necessity.'" *Id.* It urges the Board to adopt what it claims is a new necessity standard. *Id.* at 9.

We address the necessity standard in the following section. In reality, however, RLD's proposal is not for a new necessity standard at all, but instead, in different terms, for elimination of modification of CBAs under the statute and establishment of a different regime under the Washington Job Protection Agreement of 1936 ("WJPA") that would impose almost interminable delays on the implementation of mergers. In short, it is still contending for a result that is contrary to § 11321(a) as construed in *Dispatchers*.

Specifically, RLD asks the Board to adopt what it claims is a necessity standard established by the ICC's decision in *Southern Railway – Control – Central of Georgia Ry.*, 331 I.C.C. 151 (1967)("*Southern Control*"): that carriers must implement mergers "in accordance with" their CBAs except as modified pursuant to the WJPA, which it

cannot, "by definition," be necessary to "abrogate." RLD Reply Comments on NPR at 8-9. In essence, RLD's argument is that modification of CBAs under the statute is never necessary because a CBA, the WJPA, provides an appropriate procedure for modifications as necessary to implement transactions.

Southern Control certainly does not support RLD's proposal. In *Southern Control* the ICC clarified that the WJPA was incorporated into the protective conditions to the extent necessary to implement approved transactions, but did indeed "abrogate" the WJPA's implementing arbitration provision, 331 I.C.C. at 153, noting it was subject to "protracted delay," and substituted an arbitration provision intended to alleviate some of this delay.[3/] RLD's "necessity" proposal is simply a reiteration of its proposal that the Board do away with the expedited *New York Dock* implementing procedures, reject even the *Southern Control* arbitration procedure, and leave the implementation of mergers to the old WJPA procedures. See RLD Comments on NPR at 9-10. As we have explained in our prior comments, the WJPA procedures lacked any deadlines for completion and allowed unions to block arbitration by claiming that no impasse in negotiations had occurred; therefore it sometimes took years after a consolidation was approved before it could be implemented. Moreover, the WJPA contains a withdrawal provision, which if the unions invoke successfully, would leave implementation of

---

3/ See *Southern Railway – Control – Central of Georgia Ry.*, 317 I.C.C. 557, 566 (1962). The arbitration provision adopted in *Southern Control* gave either party the right to invoke arbitration if negotiations did not produce agreement within 30 days. *Id.* *Southern Control* imposed no deadline for completion of arbitration, however, and thus the procedure could be manipulated and delayed substantially. *New York Dock* remedied that problem and required that the entire implementing procedure, from initial notice through final arbitration award, be completed within 90 days.

mergers subject to the virtually interminable RLA procedures. Thus, RLD's so-called "necessity" proposal is that carriers be subjected to a CBA under the RLA (the WJPA) that could indefinitely delay the implementation of mergers, frustrating their public transportation benefits. Section 11321(a) as construed in *Dispatchers* precludes adoption of that proposal.

II. RLD's and DOT's Necessity Proposals Are Contrary to Law and the Public Interest

Beyond what we have just said, both RLD and DOT have asked the Board to adopt new (but somewhat different) necessity standards for modifying CBAs under §§ 11321(a) and 11326(a) which they claim were applied under former § 5(11) by the Fifth Circuit in *City of Palestine* v. *United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied sub nom. Missouri Pacific R. Co.* v. *City of Palestine*, 435 U.S. 950 (1978). RLD Reply Comments on NPR at 7, DOT Reply Comments on NPR at 3.

DOT claims that *City of Palestine* distinguished "contracts that are merely a *burden* to a transaction," which could not be modified, and "contracts that are an *obstacle* to a transaction," which could be modified. *Id.* (emphasis added). The Fifth Circuit drew no such distinction. The court's distinction was between contracts that are burdens only on interstate commerce *generally*, and contracts that burden implementation of *mergers*. 559 F.2d at 414-15; see NRLC Reply Comments on NPR at 10-11. Application of the Fifth Circuit's distinction requires no change in existing rules, because it is compatible with the necessity standard established by the District of

Columbia Circuit[4/] and followed by the Board in *Carmen III* (and well before *Carmen III*).[5/] The Board should not accept DOT's invitation to create a new jurisprudence distinguishing "burdens" and "obstacles," because it is not supported by *City of Palestine* or any other decisions, and the distinction between so-called "burdens" and "obstacles" is unintelligible: both burdens and obstacles are impediments to implementation of a transaction. See Roget's International Thesaurus § 1011.4 & .6 (5th ed. 1992)(listing both "obstacle" and "burden" as synonyms for "impediment"). Such a standard would foment disputes over which impediments to implementation are "burdens" and which are "obstacles," and could snuff out many of the public transportation benefits of mergers that are authorized by law after Board approval.

For its part, RLD claims that adoption of its version of a supposed *City of Palestine* standard is necessary to remedy what RLD characterizes as the "arbitrary and capricious" maintenance of two different necessity standards, one for CBAs and

---

4/ *RLEA* v. *United States*, 987 F.2d 806, 815 (D.C. Cir. 1993); see also *UTU* v. *STB*, 108 F.3d 1425, 1431 (D.C. Cir. 1997); *American Train Dispatchers Ass'n* v. *ICC*, 26 F.3d 1157, 1163-64 (D.C. Cir.1994).

5/ *CSX Corp. – Control – Chessie System, Inc.*, STB Finance Docket No. 28905 (Sub-No. 22) at 25-27 (served Sept. 25, 1998)("*Carmen III*"). Despite RLD's persistent references to "the *Carmen III* standard," *Carmen III* is not the first STB or ICC decision following the District of Columbia Circuit standard. As the Board stated in *Carmen III*, the necessity standard was "definitively resolved" by the time of that decision, and was discussed by the Board "solely for purposes of exposition." *Id.* at 21 n.20. Since its inception, the Board has followed that standard, and the ICC followed it in the "necessity" decisions it issued after the D.C. Circuit first established that standard in *RLEA* v. *United States*. See, *e.g.*, *Norfolk Southern Ry. – Trackage Rights – Norfolk & Western Ry.*, Finance Docket No. 32661 at 4 (STB served February 2, 1996); *CSX Corp – Control – Chessie System, Inc.*, 10 I.C.C.2d 831, 846-47 (1995).

one for all other types of rights, which RLD hints may violate the Fifth Amendment. RLD Reply Comments on NPR at 11-12. That claim is baseless.

RLD claims that in *City of Palestine* the Fifth Circuit rejected realization of a "public transportation benefit," the "justification used by the Board in *Carmen III*" for modifications of CBAs, as an "overbroad application of the necessity standard." RLD Reply Comments on NPR at 8. That mischaracterizes both the Fifth Circuit's decision and the District of Columbia Circuit necessity standard applied by the Board under *Carmen III*. The Fifth Circuit rejected modification of contractual rights "even when it served the *general public interest*" when the modification "is *irrelevant to the success of approved transactions*." 559 F.2d at 414-15 (emphasis added). Under the District of Columbia Circuit standard, a CBA may be modified only if "'necessary in order to secure to the public some transportation benefit *flowing from the underlying transaction* . . . .'" *Carmen III* at 26 (emphasis added), quoting *RLEA* v. *United States*, *supra*, 987 F.2d at 815. *City of Palestine* thus provides no support for a new necessity standard that would factor public transportation benefits out of the calculus. Adopting such a standard would be a sea-change from *Carmen III*, inconsistent with District of Columbia Circuit precedent, and at odds with the general goals of the Board's proposed new merger rules. Indeed, the very purpose of the power to modify contracts under §§ 11321(a) and 11326(a) is to achieve the public transportation benefits of approved transactions.

Finally, RLD claims that the Board does not apply as stringent a necessity standard to modification of rights under CBAs as it applies to modifications of other

rights, citing three decisions as illustrations. See RLD Reply Comments on NPR at 10-11. Those three cases show nothing of the kind. As RLD admits, in each of those cases the carrier was held to be relieved from obligations that would have impeded the implementation of the *approved transaction*.[6/] RLD Reply Comments on NPR at 10. The result is the same in cases where modifications of CBAs are at issue. The "standard" that was applied in all three cases was simply the statutory standard under what is now § 11321 (a), without embellishment.[7/]

6/ In *CSX Corp. & Norfolk Southern Corp. – Control & Operating Leases/Agreement – Conrail, Inc.*, STB Finance Docket No. 33388 (Decision No. 101) at 2 (served Nov. 19, 1998), the Board clarified that it had overridden a Special Court order that gave the Providence & Worcester a right of first refusal to buy a Conrail station if Conrail discontinued its operations there, to the extent necessary to allow CSX to "step into Conrail's shoes" under the order. In Decision No. 89 in the same CSX/NS/Conrail transaction, the Board granted CSX and Norfolk Southern a 6-month override of anti-assignment clauses in shipper contracts to allow the carriers "to plan adequately their operations immediately after the merger" and avoid "operational problems" during initial implementation of the transaction. *CSX Corp. & Norfolk Southern Corp. – Control & Operating Leases/Agreements – Conrail, Inc.*, STB Finance Docket No. 33388 (Decision No. 89) at 72-73 (served July 23, 1998). In *Union Pacific Corp. – Control & Merger – Southern Pacific Rail Corp.*, Finance Docket No. 32760 (Decision No. 66) at 10-11 (STB served Dec. 30, 1996), the Board overrode a consent provision in a trackage rights agreement between the Denver & Rio Grande and Utah Railway that arguably could have allowed Utah Railway to block Burlington Northern Santa Fe access to facilities on the line in question, which the Board had granted BNSF as a condition of the UP/SP merger.

7/ RLD compares the NRLC's position on necessity to that of Greyhound in *Mt. Hood Stages, Inc. v. Greyhound Corp.* 555 F.2d 687 (9th Cir. 1977), *vacated*, 437 U.S. 322 (1978). There is no relevant comparison. In that case, Greyhound made commitments to the ICC that it would not use a series of acquisitions of smaller bus carriers to engage in specific types of anticompetitive conduct and would take affirmative actions to maintain competition in the relevant markets. The ICC relied on those commitments in approving the acquisitions. Later, the ICC found that Greyhound had breached those commitments, "inspired by a desire to stifle competition'" and "'destroy Mt. Hood.'" 555 F.2d at 692 (citation omitted). Mt. Hood then filed a Sherman Act antitrust action against Greyhound, which was found liable by a jury for treble

(continued...)

III. Negotiations With Other Unions

The Brotherhood of Railroad Signalmen ("BRS") proposes that the Board limit the parties to a "specified period of time in which to resolve this issue jointly absent the STB issuing a final rule in this specific area," and, in order to provide "leverage to the process," "indicate to the industry that the Board is considering a final rule that could prohibit any arbitrator. . . to override, modify or abrogate a collective bargaining [agreement]." BRS Reply Comments on NPR at 3. As the Board is aware, the NCCC has already reached agreement with the UTU disposing of the CBA modification issue, and as we have advised the Board, the NCCC is committed to seeking agreement with the other unions. The BRS's proposal is unwarranted for two reasons.

First, the Board should not undertake or threaten administrative intervention in this matter either now or at some future date. The matter can (as the UTU example shows) and *should* be resolved by voluntary agreements. Voluntary agreements are based on the parties' mutual understandings of what they can live with and are far more likely to lead to lasting acceptance. Administrative intervention will not yield a resolution acceptable to both sides but instead will simply tilt the playing field in negotiations.[8/]

7/ (...continued)
damages, relief the ICC could not have awarded. On appeal, Greyhound claimed immunity from the "antitrust law" under former § 5 (11), but the court rejected that claim. *Id.* at 688, 694. In other words, in *Mt. Hood*, the court rejected reliance on the immunity provision by a carrier to shield itself from liability for unlawful conduct that had not been authorized by the ICC, which approved the transactions only on the strength of the promise by the carrier that it would *not* engage in such conduct. The District of Columbia Circuit standard would yield the same result.

8/ RLD and its allies (including DOT) have argued in these proceedings that this "dispute" arose because the ICC departed from a prior policy in 1983 and only then
(continued...)

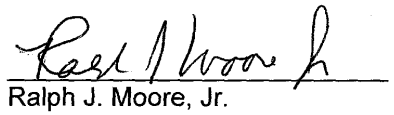
Second, the "leverage" the BRS proposes -- to tell the parties, in essence, that if they do not reach agreement the Board may outlaw contract modifications altogether, even if necessary to implement approved transactions -- will constitute a repudiation of the UTU/NRLC agreement, will leave the other unions with no reason at all to enter into any agreement, and in fact would be unlawful. As we have demonstrated, elimination of the power to modify contracts when necessary to implement mergers would be flatly contrary to § 11321(a) as construed in *Dispatchers*.

CONCLUSION

The NRLC urges the Board to delete the third sentence of proposed § 1180.1(e) because it may mislead arbitrators and parties into thinking that the Board means to rule out modifications of CBAs that are necessary to fully implement approved mergers. The necessity proposals of RLD and DOT should not be adopted because they are contrary to law and the public interest. The BRS's proposal that the Board order negotiations for voluntary agreements between the carriers and the unions under the threat of eliminating the power to modify CBAs will make any true "voluntary" agreement impossible and would violate § 11321(a).

8/ (...continued)
began modifying agreements. We have demonstrated in previous filings that this claim is contrary to the historical facts. See NRLC Comments on ANPR at 4-10.

Respectfully submitted,



David P. Lee, Vice Chairman & General Counsel
Joanna L. Moorhead, Labor Counsel
National Railway Labor Conference
1901 L Street, N.W.
Washington, D.C. 20036

Ralph J. Moore, Jr.
Eugenia Langan
Donald J. Munro
Shea & Gardner
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Attorneys for the National Railway Labor Conference

January 11, 2001

CERTIFICATE OF SERVICE

I certify that I have this 11th day of January, 2001, served the foregoing Rebuttal Comments of the National Railway Labor Conference by causing copies thereof to be delivered by first-class mail to all parties on the service list.

Eugenia Langan